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FREE PRESS vs. FAIR TRIAL

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> There is a good deal of loose reasoning on the subject of the liberty of the press, as if its inviolability were constitutionally such, that, like the King of England, it could do no wrong, and was free from every inquiry, and afforded a perfect sanctuary for every abuse; that, in short, it implied a despotic sovereigny to do every sort of wrong, without the slightest accountabiliy to private or public justice. Such a notion is too extravagant to be held by any sound constitutional lawyer, with regard to the rights and duties belonging to governments generally, or to the state governments in particular . . . A man may be allowed to keep poisons in his closet; but not publicly to vend them as cordials.
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> 2 Story, Commentaries on the Constitution of the United States, sec. 1884 (2d ed. 1851)[1]

MUCH of the serious comment and reflections on the shortcomings of the American press[2] is nurtured by a noble vision of the role of a free press[3] in our society. It is a vision which I and many others share. Indeed, it is hard to enunciate thoughtful words critical of this free institution which do not at the same time commend it to all humanity and cherish it as indispensable to democracy. This is as it should be. And yet, as doubtless with other critical analyses, the impetus for this article is the all-too-frequent failure of the press, either through lack of concern or lack of understanding or both, to subscribe to standards and perform in a fashion which fortify and replenish the democratic system, not degrade it or pander to its basest aspects.

"Freedom of the press" is a slogan in our national life, and like

[1] Quoted in Edelman, *Freedom of the Press–License to Obstruct Justice?* 1, May 1961 (unpublished paper in Harvard Law School Library).

[2] There is an ever-growing body of scholarly discussion in legal and other periodicals on the shortcomings of the American press, especially as they affect the right to a fair trial. Many of these periodicals will be referred to by citation in subsequent footnotes as this article progresses.

[3] Throughout this article the word "press" is meant to apply to all media which disseminate news, including radio and television; particular emphasis, however, is meant to be given to the daily newspaper.

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many such phrases which have embedded themselves in the historical consciousness of the country, its purpose and meaning are too often and too easily obscured by its mere invocation. This is no less true of it when used or applied in a legal context. As Mr. Justice Holmes once aptly observed, "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[4]

Of all the ideas which have suffered this analytical paralysis, none suffers more than "freedom of the press." And nowhere, as will develop, is its contagion more injurious than in the courtroom. Both within and without the legal profession, the easy acceptance of this phrase as a kind of necessary nostrum for every ill of democracy, regardless of whether or not it proves an appropriate and effective ministration, has created a situation which makes the press' treatment of criminal trials and certain of their antecedents[5] a significant threat to the fair administration of criminal justice by the courts.

In most areas which are subjected to news coverage, the charge generally lodged against the press is that it has abused its right to inform the public, either by misinforming or not fully informing the reader, viewer or listener, slanting a report in a particular direction, misquoting, unfairly interpreting a certain situation or the like. These are problems of thoroughness and accuracy, of professional competence and integrity, and while they also inhere in the coverage of criminal trials and almost invariably result in an inaccurate and incomplete picture of what is actually happening in the courtroom, they are not, as such, the principal sources of injury to the judicial system. If they were, the judiciary's complaint against the press, while substantial, would not vary markedly from that of other individuals or groups whose activities are relatively open to press scrutiny.

The distinctive and overriding concern of those responsible for the administration of criminal justice, however, is that the press, even when it reports crimes and criminal trials with reasonable thorough-

[4] Hyde v. United States, 225 U.S. 347, 391 (1912) (dissenting opinion).

[5] Disclosure by the press before trial of such information (referred to in the text as "antecedents") as, *e.g.*, the accused's prior criminal record, the existence of a confession or of incriminating evidence seized in the course of a search or arrest, the refusal of an accused to submit to a lie-detector test, or the opinion of anyone on the question of guilt or innocence may, as will appear within, substantially impair the prospects for a fair trial.

ness and accuracy—which is seldom[6]—too often in the very process encroaches upon and subverts the constitutional right to a fair trial by an impartial jury.[7] The manner and extent of this will be recited below. It is enough to state here that press interference with the proper administration of criminal justice is no mine-run interference with a relatively inconsequential activity in society which must compete in the marketplace, as it were, for attention, influence and effectiveness; it is an interference with a constitutionally protected guarantee, one to which the Bill of Rights accords at least as full dignity as "freedom of the press."[8] This analysis, it seems to me, properly dislodges the press from the superior footing which it enjoys in constitutionally unprotected areas, and requires that it justify itself in a no-more-than-equal setting.

The First Amendment's free press guarantee, like all other constitutional guarantees, is not absolute.[9] Just as not every form of speech

[6] Mr. Justice Frankfurter had this to say on the question of press coverage of criminal trials:

". . . When I arrived here in time for the opening of the law school, I didn't know that there was such a crime as the Braintree holdup-murder. So far as I know I'd never heard the names Sacco and Vanzetti. I knew nothing about it—just nothing. Soon, however, it got into the papers, and I didn't read anything about it because it was my habit, is my habit, engendered from my experience in the United States Attorney's Office, not to read accounts of trials as reported in the press unless the press purports to report the trial verbatim. My experience during those years about trials in which I took part as I saw them reported even in the best papers was distortion, mutilation and at best an opaque account of what took place in the court room." (FELIX FRANKFURTER REMINISCES 208 [Phillips ed. 1960]). My own experience with press coverage of trials in which I have taken part entirely confirms Mr. Justice Frankfurter's experiences.

[7] U.S. Const. amend. VI: the constitutions of thirty-nine states embody a similar guarantee of impartiality and in the remaining eleven it is reasonably inferable from the right to trial by jury. See Edelman, *Freedom of the Press—License to Obstruct Justice?*, note 1 *supra*, at 16–17. See also Columbia Univ. Legislative Drafting Research Fund, Index Digest of State Constitutions 578–79 (1959), referred to in Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349 n. 5 (1960).

[8] Mr. Justice Frankfurter, concurring in Irvin v. Doud, 366 U.S. 717, 730 (1961) stated: "This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived."

[9] Those who take the position that there are absolutes in the Bill of Rights usually relieve themselves of the logical inconsistency of such a position through the use of semantics. Mr. Justice Black, for instance, asserts that the rights set forth in the Bill of Rights, including "freedom of the press," are absolutes, subject to no qualifications whatsoever—"without ifs, buts or whereases." Accordingly, he denies the validity of all laws relating to libel or defamation. See generally, his lecture, 35 N.Y.U.L. REV. 865 (1960) and his interview, 37 N.Y.U.L. REV. 549 (1962).

However, when he was asked during the course of his interview (p. 558) whether it

or writing is within the contemplation of the free speech protection,[10] so not every form of press inquiry is within the free press protection.[11] Nor, as a matter of logic, can any constitutional guarantee be absolute, for there is an inevitable overlapping of and competition between protected rights, out of which some accommodation in reason and policy must be reached in order that one not be largely sacrificed for the sake of preserving another.[12]

Accordingly, when "freedom of the press" competes with other constitutionally protected guarantees, particularly when it encroaches on their domain—which is the way in which the conflict usually arises —it should be held to a high degree of accountability and prove itself of significant social value in order to warrant the intrusion. When the press moves in these other protected areas, it cannot be permitted to turn its attention willy-nilly on every event or item which fulfills its often elusive and sometimes jaded concept of news, in disregard of rights which are as fully and equally enshrined in the Constitution.[13]

Confidential government documents, for example, however newsworthy, are not the legitimate subject of complete press inquiry.[14] Disclosure to the press of information not open to the public generally could seriously undermine the various branches of the Govern-

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would be constitutional to prosecute someone who falsely shouted "fire" in a theatre, he first made the statement that "[n]obody has ever said that the First Amendment gives people a right to go anywhere in the world they want to go or say anything in the world they want to say" and then stated that the man shouting "fire" would be arrested "not because of *what* he hollered, but because he *hollered*." This, it seems to me, is merely playing with words.

See also note 38 *infra*.

[10] See Roth v. United States, 354 U.S. 476 (1957) and Beauharnais v. Illinois, 343 U.S. 250 (1952) wherein obscenity and group libel, respectively, were held not to be within the protection of the first amendment.

[11] See note 14 *infra* and accompanying text.

[12] See American Communications Ass'n v. Douds, 339 U.S. 382, 398 (1950) where the Court said, "The right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court." In this regard, the Court cites such cases as Kovacs v. Cooper, 336 U.S. 77 (1949) (blaring sound truck); Prince v. Massachusetts, 321 U.S. 158 (1944) (health of children); and Cox v. New Hampshire, 312 U.S. 569 (1941) (unauthorized parade). See also note 38 *infra*.

[13] *Ibid.*; see also note 8 *supra*.

[14] See Trimble v. Johnston, 173 F. Supp. 651 (D.D.C. 1959) (denial of a mandatory injunction which would have required defendants to permit plaintiff to inspect and copy certain payroll records and other documents and papers relating to disbursement of Government funds by the United States Senate).

ment in the discharge of duties and responsibilities entrusted to them by the Constitution.[15] This restraint on the press has sound reasons to support it, reasons to which much of the press itself subscribes. It should be added, of course, that control of allegedly classified information may be subject to abuses by the Government, but in this realm of constitutional conflict, the overall balance decidedly favors the Government's interest over that of "freedom of the press."

In much the same sense, the press must come forward with sound reasons to justify its present treatment of crime and the criminal trial as that treatment affects the fair administration of justice. And these reasons must have deeper roots than the press' own subjective standard of newsworthiness, since that standard often accords the administration of criminal justice little more significance and stature than that accorded the death of a movie actress, a catastrophe or a sporting event. In this constitutionally protected area, some basis other than the lurid or curious appeal which the entire transaction may have for the paying customer must be demonstrated.

ASSUMPTIONS EXAMINED

Perhaps the most obvious but unanalyzed assumption on which press coverage of criminal trials rests is that the constitutional guarantee of "freedom of the press" confers on the public and the press a so-called "right to know," a doctrine which is much used but ill-defined.[16] If there were any such right, it should logically permit rep-

[15] *Id.* at 656, wherein the Court stated, "Thus, it would hardly be argued that the press, in exercising its Constitutional privilege, may insist on the admission of its representatives to meetings and conferences that are not open to the public, such as, for example, executive sessions of Congressional committees, meetings of the President's cabinet, conferences of judges in deciding cases that have been argued before them, as well as other similar groups. Similarly, it would hardly be urged that the press is entitled to access to written material that the law does not regard as being automatically open to public inspection, such as, for example, staff reports submitted to Congressional Committees, until the latter choose to release them; letters to the President from his advisers, unless he sees fit to make them public; memoranda written by personnel of executive departments to their superiors; or drafts of contemplated or tentative opinions of members of the judiciary until they take final form and are publicly handed down. . . .

"The conclusion is inevitable that the Constitutional privilege of freedom of the press does not include a right on the part of representatives of the press to inspect documents not open to members of the public generally."

[16] This doctrine, which has found expression in such articles as Douglas, *The Public Trial and the Free Press,* 46 A.B.A.J. 840 (1960) and Wiggins, *The Public's Right to Public Trial,* 19 F.R.D. 25, 35 (1955), has no specific support in the Constitution. As Emory H. Niles, Chief Judge of the Supreme Bench of Baltimore City, stated in "The Law of the United States: The Power of the Court and a Free Press," an address at

resentatives of the press to be present in the judge's chambers during pretrial conferences regarding such matters as legal questions which may arise at the trial, the conduct of the *voir dire* examination, etc.; similar conferences during trial dealing with the court's instructions to the jury and other matters; and, of course, during the deliberations of the jury itself. There has been no serious suggestion, however, that any of these areas are properly within the surveillance of the press. Indeed, as to jury deliberations, Congress has made it a criminal offense for any person knowingly and willfully to record, listen to or observe a grand or petit jury "while such jury is deliberating or voting."[17] It would seem that proponents of the so-called "right to know" should leap to challenge the constitutionality of this enactment. The fact is that no such right is to be found in the Constitution, and further, as is apparent from the foregoing discussions of trials and the non-disclosure of confidential government documents, there are a whole host of matters which would appeal to the variegated interest of the public but to which no one supposes the press should be privy.

In all the talk about the "right to know" as it relates to criminal proceedings, the point which generally and conveniently escapes the attention of the press is the reason for the public nature of criminal trials. The Sixth Amendment provides, in part: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."[17] Nowhere else in the Constitution is there mention of any other beneficiary of the right to a public trial than the accused—neither the press, the public, the judge nor the jurors. The presence of the press is merely an avenue by which the accused may obtain a fuller expression of this right. Yet it is a right which, to say the least, has become of dubious value. Indeed, it is the harshest irony that the exercise of a right secured to the accused is all too often the vehicle of his destruction.[18]

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the 85th Annual Meeting of the American Bar Association, August 4, 1962: "Some newspapers have at times tried to justify such publications by the invention of a 'Right to Know' in the public. Whatever such a right may amount to, it is not mentioned in the Constitution, and I think it is hardly debatable that if its exercise interferes with a constitutional right, it must yield to the rights set forth in the Constitution."

[17] 18 U.S.C. sec. 1508.

[18] See, *e.g.*, Irvin v. Dowd, 366 U.S. 717 (1961) and Marshall v. United States, 360 U.S. 310 (1959), wherein press treatment of the respective cases prior to and during the trials resulted in such prejudice to the defendants that neither was able to secure a fair trial. In his concurring opinion in the *Irvin* case, Mr. Justice Frankfurter stated at 730:

The main benefit which the accused is meant to derive from a public trial is protection against the arbitrary use of judicial power.[19] While there is always a danger of such an abuse, it is highly questionable whether press coverage of criminal trials affords any appreciable source of restraint. In fact, the erroneous and distorted picture which the press often conveys of criminal proceedings is much more likely to create the illusion of malfeasance or, conversely, the illusion of competence where one or the other does not exist.

The real safeguards to the accused in curbing judicial excesses are not only his right to a public trial,[20] but, of equal or greater importance, the quality of judges, the rigorous employment of the adversary system by competent counsel, the provisions for appellate review, and the various guardians, not directly connected with the courts but within the legal profession and academic community, who provide scholarly analysis of the judicial system, its shortcomings and its developments. This is not to say that the press, as a conduit in aid of the right to a public trial, has no role to play in guarding and preserving the integrity of the courts. Regrettably, though, it has too often wielded its considerable power as an instrument of subversion, not improvement or enlightenment.

Notwithstanding the abstract benefit which the press may afford the courts and litigants, it must be remembered that its access to the courtroom is not based on any inherent right which it enjoys, but stems from the right of the accused to a fair trial and the assumption that the press will further this end. It is a right which, like most rights, can and at times has been waived.[21] And on such occasions the public

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"Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. Indeed such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury."

[19] See In re Oliver, 333 U.S. 257, 270 (1948).

[20] Even as to this right it is sufficient "if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused . . . are excluded altogether." 1 Cooley, *Constitutional Limitations* 647 (8th Ed. Carrington 1927).

[21] See, *e.g.*, United States v. Sorrentino, 175 F.2d 721 (3rd Cir. 1949), *cert. denied*, 338 U.S. 868 (1949).

and the press may be excluded.[22] This, however, is at best only a partial solution, since an equally significant threat to the administration of criminal justice is caused by pretrial publicity, which frequently brings to the attention of prospective jurors and the public-at-large information which, for reasons deemed essential to a fair trial,[23] is excluded from the evidence presented to the jury.

Furthermore, there is no assurance that the accused would be willing to waive his right to a public trial in a situation where there has been substantial pretrial publicity and where the possibility of heavy trial publicity impends. Since one basis for appeal from a conviction is prejudicial press publicity,[24] few defendants move for press exclusion, in the hope that the appellate court will ultimately reverse the conviction and order a new trial.[25] Here the interest of the sovereign and the people come into play and the dubious efficacy of reversals on grounds of prejudicial publicity can be seen. The vagaries of retrying cases are many, particularly where the possibility of more prejudicial publicity may again be a significant factor.[26] Moreover, depending on the lapse of time involved, the practical opportunity for a retrial may have evaporated with the death of key winesses or the loss of valuable evidence.[27] Thus, it can be either the public or the accused who suf-

[22] "[F]reedom of the press is in no way abridged by an exclusionary ruling which denies to the public generally, including newspapermen, the opportunity to 'see and hear what transpired.'" United Press Ass'ns v. Valente, 308 N.Y. 71, 77, 123 N.E. 2d 777, 778 (1954).

[23] See note 34 *infra* and accompanying text.

[24] See note 18 *supra*.

[25] While there are no cases or other data which directly support this conclusion, it seems a reasonable inference from the absence of such motions. It is worth noting the case of People v. Jelke, 308 N.Y. 56, 123 N.E. 2d 769 (1954), however, wherein the defendant, after conviction on two counts of compulsory prostitution, successfully pressed the argument on appeal that the trial court's action in excluding, over his objection, all members of the public and the press except certain of his friends and relatives constituted a denial of his right to a public trial.

[26] As to the possibility of diminished publicity of a subsequent trial, the following is a surmise from Comment, *The Case against Trial by Newspaper*, 57 *N.W.U.L. Rev.* 217, 226 n. 32:

". . . It is quite possible that a potential deterrent effect will result—not by means of the usual deterrent force—threat of existing modes of punishment—but by means of that psychological pressure which renders a newsman hesitant to do that which he thinks is, and which in fact is, likely to result in reversal of the conviction of a person whom the newsman thinks is guilty, and which renders him fearful that continued reversals may eventually lead to external curbs upon freedom of the press."

[27] *Cf.*, Michel v. Louisiana, 350 U.S. 91, 98 n. 5 (1955); United States v. Fay, 183 F. Supp. 222, 227 n. 6 (S.D.N.Y. 1960), *rev'd*, 300 F. 2d 345 (2nd Cir. 1962), aff'd Fay v. Noia, 31 U.S.L.W. 4255 (March 18, 1963).

fers as a result of the publicity, to say nothing of the ill effects on the fair and efficient administration of criminal justice. All this, I believe, is an extraordinary price to pay for our laissez-faire notion of "freedom of the press" and our relatively unexamined adherence to its supposed all-embracing desirability.

There are other arguments which have been put forward to justify the public airing of criminal trials by the press. One of these is the educational value which the public is said to derive from an actual report of the workings of its courts, an argument closely associated with the public's so-called "right to know."[28] While this argument deserves some weight as an abstract proposition—an informed citizenry being fundamental to the effective operation of a democratic society—it is hardly sufficient to counterbalance the adverse effects of publicity on the administration of criminal justice. Realistically speaking, though, press reports of criminal trials do not enlighten the public, for there is little, if any, educational value in reports filled with half-truths and distortions.

If it is really the purpose of the press to inform the public about the workings of its courts, that purpose would be much better served by delaying the publication of the day-to-day proceedings of a criminal trial until the trial has terminated.[29] As it is, there is no assurance that the press will report each day's proceedings in a particular trial, let alone report them fully and accurately, and, accordingly, the likelihood that a witness' direct examination, for example, will receive broad press attention while his cross-examination receives little or no attention is great.[30] From an educational standpoint, the most balanced picture which the press could convey of judicial proceedings, short of a verbatim report, would come from a comprehensive summary after trial, not from the bits and pieces from which the public now must endeavor to glean anything at all of value.

Another justification, and one deserving of more consideration, is the legitimate interest which the public has in being apprised of the

[28] See note 16 *supra.*

[29] In England, *e.g.*, in aid of strict enforcement of the doctrine of constructive contempt, only the fact of arrest and matters adhering to pretrial procedure can be published before the trial is concluded. See generally, Baltimore Radio Show v. Maryland, 338 U.S. 912, 921–36 (1950) (appendix to opinion of Mr. Justice Frankfurter *re* denial of *certiorari*). There is nothing to indicate that English readers have lost interest in criminal trials and the workings of their courts because of the enforced delay of publication.

[30] See note 6 *supra.*

occurrence of crime and the apprehension of a suspect. Certainly the citizenry is entitled to be informed of the efficiency and effectiveness of its police force and the relative safety of the community. Equally, it is entitled to have any fear allayed, particularly in cases of heinous crimes, by the knowledge that a bona fide suspect, without naming the person, has been taken into custody.[31] Few people would argue against making this information available, assuming its accuracy under the circumstances; indeed, this is an area in which the press performs one of the kinds of services which its constitutional guarantee contemplates. No one is proposing to eliminate this service. What is proposed is that a long, hard look be taken at the accommodation which has been reached between the equally cherished guarantees of free press and fair trial in order to determine whether a serious readjustment is not required. It is my belief that, while the press has a legitimate role to play at the very early stages of the criminal process, the nearer the case moves to trial and to an actual determination of guilt or innocence, the less the role and interest of the press can be supported on any basis of reason, law or social policy and the more the interests of justice merit protection.

THE BURDEN OF PROVING INJURY

Much of the foregoing has been predicated on the assumption that, in fact, the press does adversely and significantly affect the fair administration of criminal justice. The press demands proof, contending that there is no scientific evidence that prejudice does result from the publication of information which the law will not permit the jury to consider in determining guilt or innocence.[32]

It seems appropriate here, however, to raise the question of who, in fact, should bear the burden of proof and persuasion on this issue—the courts or the press. The apparent assumption of the press in this, as in most areas, is that the other side has the burden of demonstrating that the press is out-of-bounds, never that the press has the burden of demonstrating that it is within bounds. As previously indicated, the former may be a fair assumption in unprotected areas, but not in areas where the press clashes with another constitutional guarantee.[33] It

[31] While the name of a suspect will eventually become known to sources other than the police if he or she is bound over for trial, it would seem that every effort should be made to protect a person who has been picked up on suspicion of committing a crime but is later released.

[32] See note 36 *infra*.

[33] See text accompanying notes 6–12 *supra*.

therefore seems at least equally justifiable for the judiciary to demand proof by the press that its treatment of criminal trials and certain of their antecedents does not impinge on the fair administration of criminal justice. It is the press which invades the sanctuary of the courtroom, not the courtroom that of the press.

Accordingly, the press should demonstrate that the publication of a person's prior criminal record or of his purported confession before trial or before its admission into evidence during trial is neither adverse to the accused nor to the administration of justice. The presumption against the publication of such information, which Anglo-American law permits to enter into the determination of guilt or innocence only under the most carefully defined circumstances,[34] is great. Yet this information is uniformly and with impunity broadcast, frequently with provocative headlines, by the great majority of the press long before that determination has been made.

It is argued, however, that not every juror or prospective juror may have been contaminated by this information, that those who have can be weeded out, and that, in any event, whatever adverse effects the information may produce can be substantially erased from the minds of the jurors. Trial judges who have faced the task of selecting an impartial panel of jurors in a case which has been subjected to widespread pretrial publicity know the lingering doubts which exist even after all available protective techniques have been utilized.[35] Why, furthermore, should we have to tolerate the mere possibility of a contaminated panel of jurors when there is so little demonstrable benefit which flows from the disclosure of such information and so much potential harm which may be inflicted on the defendant, the public and the administration of justice? And, it should be pointed out, the only scientific data available, though fragmentary, supports the conclusion that emotionally charged news reporting is prejudicial.[36]

The law, in excluding from the knowledge of jurors certain information such as coerced confessions, prior criminal records, hearsay evidence, refusal to submit to a lie-detector test, etc., itself necessarily deals only in possibilities, not certainties. Yet this exclusion is consist-

[34] With respect to a defendant's prior criminal record, see, *e.g.*, 1 WIGMORE, EVIDENCE § 196 (3rd Ed. 1940) and *id.* at vol. 3, §§ 980-7; as to confessions, see, *e.g.*, *id.* at vol. 3, §§ 821-67.

[35] For a discussion of the effectiveness of these techniques, see note 39 *infra*.

[36] See Note, *Controlling Press and Radio Influence on Trials*, 63 HARV. L. REV. 840 (1950).

ently maintained or the admission into evidence carefully controlled in spite of the countervailing benefits which might accrue by freely permitting jurors to learn the substance of any of the above, benefits which could be considerably greater than those derived from the publication of this information to all the world, prospective jurors and the public alike. A coerced confession, for example, may be a true confession and its exclusion from a jury's consideration may materially harm the prosecution's case, but the possibility that a confession secured under such conditions is unreliable and, more importantly, the abhorrence with which a decent democratic society views such a procedure combine to militate against its admission into evidence.[37]

But where are the countervailing benefits in the publication of a confession by the press before the evidentiary value of such a document or statement can be tested in court? Will the public be any safer in the knowledge that a suspect has confessed, when that confession may have been induced by means which cast such doubt on its validity that a jury will not be permitted to consider it? Will its confidence in the effectiveness of the police be intelligently enhanced by publication in such circumstances?

In the almost total absence of reasonable and appreciable benefits which inure to the public from the disclosure of information which courts strive so mightily to keep from the knowledge of the fact-finders until a proper basis has been laid for its admission, it is to be wondered why, save for unquestioning attachment to the analytically neglected slogan of "freedom of the press," this practice has been allowed to continue. The policy of the law has always been to weigh competing interests in order to arrive at a fair accommodation when there is at least some discernible merit in pursuing either course.[38] In

[37] See Rogers v. Richmond, 365 U.S. 534, 540–41 (1961).

[38] *E.g.*, Mr. Justice Harlan, dissenting in Wood v. Georgia, 370 U.S. 375, 396–97 (1962), stated that "the right of free speech, strong though it be, is not absolute; when the right to speak conflicts with the right to an impartial judicial proceeding, an accommodation must be made to preserve the essence of both. Thus in *Bridges v. California* . . . at 271, the Court said:

'The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. . . . We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment.'

"And again in *Pennekamp v. Florida*, . . . (at) 347: 'Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action.' See *Craig v. Harney*, . . . (at) 372–373."

the area of free press versus fair trial, the propriety and importance of invoking this policy in favor of a readjustment should be apparent in light of the imbalance of benefit and detriment which the present accommodation, if such it be, permits, and in face of the indisputably great and ever-growing audience which the press is able to reach and influence.

PRESENT SOLUTIONS

The present means by which the law purports to deal with the excesses of the press are almost all in the nature of afterthoughts or aftereffects.[39] While the Supreme Court has held that in a strong enough case prejudice resulting from pretrial publicity will be found as a matter of law,[40] thereby obviating the necessity of proving actual prejudice of individual jurors (often a quixotic effort), the best that such a determination can produce is a reversed conviction. Although some of the vagaries of reversal and retrial have already been discussed,[41] it is important to mention one other consideration which adds to the illusory nature of reversals as a remedy in these cases.

When criminal convictions are reversed for reasons other than prejudicial publicity, such as for the admission into evidence of a

[39] These means include such pretrial devices as granting a continuance or a change of venue. While a continuance may reduce some of the damage caused by prejudicial publicity, it may itself constitute injustice to either the accused or the public. Difficulties of trial are increased, witnesses may disappear or forget, and the Sixth Amendment's insistence on a "speedy" trial is not observed.

As to change of venue, it is not always readily granted. Even when it is, the prospects of appreciably diminished publicity are not good considering the present-day reach of news media. Furthermore, the sixth amendment requires that the accused be tried by "an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The use of the voir dire examination in the selection of a jury is another means by which prejudice is sought to be weeded out. While this procedure must be credited with some effectiveness, there is no way of knowing whether all the prejudice implanted by press reports, both conscious and subconscious, has been reached, and even whether that which is reached has been wholly expunged. The same is essentially true of cautionary instructions during the course of the trial. As Mr. Justice Jackson said, concurring in Krulewitch v. United States, 336 U.S. 440, 453 (1949): "The naive assumption that prejudicial effects can be overcome by instruction to the jury . . . all practicing lawyers know to be unmitigated fiction."

Locking up the jury, while it is a device which should be mentioned, is a drastic and expensive means of combating prejudicial publicity, and, in any event, is no safeguard against the adverse effects of pretrial publicity. Few courts would inconvenience jurors by locking them up from the inception of a case, and, in fact, this procedure may produce resentment by the jury against the person requesting it.

[40] See Irvin v. Dowd, 366 U.S. 717 (1961) and Marshall v. United States, 360 U.S. 310 (1959).

[41] See text accompanying notes 24–27 *supra*.

coerced confession or of illegally seized evidence, the effect of the reversal is not only to afford the accused a new trial at which the coerced confession or illegally seized evidence will be excluded, but to demonstrate to those responsible for it that there is nothing to be gained by coercion or illegal seizure.[42] Consequently, reversal in these situations has the very important by-product of supervising the administration of justice at the law enforcement level. And, in another context, when a reversal is the result of some error committed by a judge during the course of a trial, the ancillary effect of the reversal is to admonish him that a repetition of the error may result in further reversal. Yet, when a conviction is reversed for reasons of publicity, it has no effect whatsoever as a sanction against the press, and there is consequently nothing in the reversal which prevents prejudicial press treatment of the case before or during any retrial or similar treatment of future trials of other defendants.

The only concretely available sanction against the press in the foregoing circumstances is the power of the court to punish for contempt,[43] but this is a circumscribed power which has been more recently narrowed than broadened. Until 1941 the substantive rule regarding contempt was, in effect, that the publication of matter which had a tendency to, or was calculated to, obstruct justice was punishable by the court.[44] This rule, the so-called "tendency rule," was discarded in favor of the stricter test enunciated in *Bridges v. California*,[45] the nub of which is that the right of free comment is limited only to situations where there is a "clear and present danger" to the administration of justice.[46] The Supreme Court reaffirmed the "clear and present danger" test in *Pennekamp v. Florida*,[47] *Craig v. Harney*[48] and, most recently, in *Wood v. Georgia*.[49]

[42] See McNabb v. United States, 318 U.S. 332, 341–47 (1943) and Rogers v. Richmond, note 37 *supra*.

[43] A civil action may also be brought by the litigant or the accused against an offending newspaper, either for libel or in an especially provided statutory form. An action for libel, however, can only reach defamatory publications and may be defended on the ground of truth or privilege. Only Pennsylvania has provided a statutory action in favor of a person "aggrieved by publication concerning his trial, which would improperly tend to bias the minds" of the triers of fact (PA. STAT. ANN. tit. 17 § 2045 (1930)), but no action has ever been brought under it.

[44] See Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

[45] 314 U.S. 252 (1941).

[46] *Id.* at 261–62, 267.

[47] 328 U.S. 331 (1946).

[48] 331 U.S. 367 (1947).

[49] 370 U.S. 375 (1962).

The *Bridges, Pennekamp* and *Craig* cases each involved press comments and reports on matters tried to a judge without a jury and resulted in reversals of contempt convictions.[50] The cases which have reached the Supreme Court concerning alleged petit jury prejudice through publication have turned on fair trial-due process questions rather than free press considerations. And, notwithstanding Mr. Justice Frankfurter's recent assertion with respect to prejudicial press disclosures that "the Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade,"[51] there seems to be no inclination to deal by contempt citations with the excesses of the press as they affect jurors. It therefore appears that, while the Supreme Court may ultimately revise its attitude in light of changing circumstances, it is necessary to explore alternative solutions.

PROPOSED SOLUTIONS

The purpose of this article thus far has been not only to demonstrate that existing remedies are less than adequate to cope with the growing problem of prejudicial publicity; its purpose has equally been to indicate the manner and extent to which press treatment of crime and criminal trials poses a significant threat to the fair administration of justice. It is apparent that one possible solution to the problem of prejudicial publicity would be for the press—with the aid and advice of the legal community, if necessary—voluntarily to impose effective standards and restraints upon itself.

This, of course, is not a new proposal,[52] nor is it one which, for various reasons, has found much general acceptance.[53] Indeed, H. L. Mencken once wrote of such efforts:[54]

[50] *Wood v. Georgia*, the Supreme Court's most recent consideration of a contempt conviction based on the clear and present danger doctrine, involved statements by a sheriff at a press conference called by him which allegedly constituted a "clear, present and imminent danger" to the proceedings of a grand jury convened to investigate rumors and accusations of alleged bloc voting by Negroes and the rumored use of money by political leaders to obtain their votes.

[51] Irvin v. Doud, 366 U.S. 717, 730 (1961) (concurring opinion).

[52] See Comment, *The Case against Trial by Newspaper*, 57 NW. L. REV. 217, 237–38 (1962) and Edelman, *Freedom of the Press—License to Obstruct Justice?*, note 1 *supra*, at 34–35.

[53] *Ibid.*

[54] Quoted in LeViness, *Crime News*, 66 U.S.L. Rev. 370, 370 (1932).

Journalistic codes of ethics are all moonshine. Essentially, they are as absurd as would be codes of street-car conductors, barbers or public job-holders. If American journalism is to be purged of its present swinishness and brought up to a decent level of repute—and God knows that such an improvement is needed—it must be accomplished by the devices of morals, not by those of honor. That is to say, it must be accomplished by external forces, and through the medium of penalties exteriorly inflicted.

Nevertheless, while it may ultimately be concluded that external restraints are the only practical means of solution, an analysis of possible voluntary action should not be foreclosed.

It is probably as generally unknown to the newspaper profession as it is to the public that in 1923 the American Society of Newspaper Editors adopted a set of ethical canons of journalism.[55] For present purposes, it is worthwhile to quote the canon entitled "Decency":

7. Decency—A newspaper cannot escape conviction of insincerity if, while professing high moral purpose, it supplies incentives to base conduct, such as are to be found in details of crime and vice, publication of which is not demonstrably for the general good. Lacking authority to enforce its canons, the journalism here represented can but express the hope that deliberate pandering to vicious instincts will encounter effective public disapproval or yield to the influence of a preponderant professional condemnation.

This canon, by its very words, expresses the essence of the problem. On the one hand, much of this article has been directed towards showing how press "incentives" to the kind of "base conduct" which the profession itself condemns have an adverse effect on the fair administration of criminal justice. Yet, on the other hand, the admitted lack of authority within the profession to enforce its own code of conduct has obviously permitted the behavior which is condemned to continue.

In the legal, medical and other professions, means have been established by which members may be disciplined for infractions of particular canons of ethics, and while these means may not reach every such departure, they are continually invoked against violators and consequently provide a significant deterrent to "incentives to base conduct." But no disciplinary machinery exists within the newspaper profession, nor, apparently, is there a desire to establish any.[56] What-

[55] "Ethical Rules" adopted by the American Society of Newspaper Editors, April 28, 1923.

[56] Mark Etheridge, board chairman of the Courier-Journal and Louisville Times, stated recently in one of a series of interviews on the "American Character" conducted by the Center for the Study of Democratic Institutions:

"I have been going to American Newspaper Publishers Association conventions for twenty-five or thirty years, but I've quit going to the meetings. They talk mostly about

ever economic or social rationalizations are put forward to justify the absence of such machinery,[57] the fact is that there is no compelling reason why the newspaper profession, if it made the effort, could not discipline itself just as other learned groups, subject to many of the same economic and social pressures, have seen fit to do.

Voluntary action by the press may not be easy to instigate, but it should not be written off as a possible solution to the problem of prejudicial publicity.[58] If representatives of the newspaper profession were able to meet and agree on a code of conduct, they should be able to meet and agree on the machinery for its enforcement. And surely

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advertising, circulation, production and labor problems—things of that sort. There's very little discussion about the content of newspapers. On the other hand, Southern newspaper publishers usually have some provocative speeches at their regional meetings. They do discuss content and other editorial problems.

"In the last ten years the American Society of Newspaper Editors has become the most important of the newspaper associations. The editors do discuss editorial and news problems. They are about the only people in the newspaper business who get down to the fundamentals of what the newspaper business is all about."

[57] "There are, however, strong forces which probably would prevent effective internal control. For example, many editors believe that they must emphasize morbid and shocking crime news in order to prosper, and some further justify 'trial by newspaper' by stating that one obligation of their profession is to attempt to reduce crime. That the newspapers can voluntarily refrain completely from printing prejudicial material is doubtful, in light of the compulsion of competition and the lack of workable standards of prejudice." Comment, *The Case against Trial by Newspaper*, 57 NW. L. REV. 217, 237–38 (1962) and accompanying notes.

[58] Voluntary action has been taken in some areas of the country. *E.g.*, in Rhode Island, according to Judge Joseph R. Weisberger of the Superior Court of Rhode Island, "a very fine working arrangement has been reached without necessity of court rule under which The Providence Journal and Evening Bulletin, our two great daily newspapers, do not print any matter in connection with a trial which takes place outside the presence of the jury. This is a salutary example of the contribution which can be made to the rules of evidence by a responsible press. The same arrangement is observed by The Pawtucket Times, and has been generally observed by The Newport Daily News, The Westerly Sun, and other daily and weekly newspapers in our State. . . ." "The Press, The Courts, and Canon 35," an address before the National Conference of State Trial Judges at the 85th Annual Meeting of the American Bar Association, August 4, 1962.

In 1924 The Chicago Tribune stated editorially: "The Tribune advocates and will accept drastic restriction of this preliminary publicity. The penetration of the police system and the courts by journalists must stop. With such a law there would be no motivation for it. Though such a law will be revolutionary in American journalism, though it is not financially advisable for newspapers, it still is necessary. Restrictions must come." Quoted in Perry, *The Courts, the Press, and the Public (Trial by Newspaper)*, 30 MICH. L. REV. 228, 232 (1932). Unfortunately, Colonel McCormick reversed his paper's position when, in 1952, he declared that a code of press conduct would do the public an absolute disservice by preventing much reporting in the public's interest. See Note, *Press Comment on Pending Criminal Trials*, 38 VA. L. REV. 1057, 1070 (1952).

the help and advice of the legal community in making provision for the machinery and in drafting additional canons to protect the legitimate interests of both the press and the administration of justice would be readily available if a genuine desire were evidenced by the newspaper profession.[59] I am frank to say, however, that, while the difficulties facing the press in providing for means of self-discipline are not appreciably greater than those of other professions which have already faced this task, I am not optimistic about the possibility of voluntary action, though it seems to me this is the course which any self-respecting profession should follow.

In the absence of such action, the necessary alternative is the imposition of external restraints on the press. I would therefore join others who advocate the adoption of legislation which would cover the problems in this area.[60] Such legislation should provide for criminal penalties against any person responsible for the publication of prejudicial information under conditions hereinafter described before its admission into evidence at the trial. It would thus not only reach newspapermen and their counterparts in other areas of news dissemination, but also the sources of the published information such as defense attorneys, prosecutors or policemen.[61] It would, further, only apply to criminal cases tried to a jury.[62] Upon its violation, the offending party would be proceeded against by information or indictment, would have the right of trial by jury[63] and the right of appeal.

[59] There is language in *The Case against Trial by Newspaper*, note 57 *supra*, at 237 and notes 87–89, to the effect that "[s]ome journalists have indicated that, if the bar were to prescribe reasonable standards to be followed, most newspapers would gladly comply."

[60] See *e.g.*, the model statute proposed in *The Case against Trial by Newspaper*, note 57 *supra*, at 250–53; see also, Edelman, *Freedom of the Press—License to Obstruct Justice?*, note 1 *supra*, at 45–82.

[61] This would augment Canon 20 of the Canons of Professional Ethics of the American Bar Association, which condemns newspaper publications by a lawyer as to pending or anticipated litigation.

[62] The restraints of the statute would cease to apply after the point at which the accused executes a formal waiver of a jury trial, since it is generally accepted that judges are or should be better able to withstand the prejudicial effect of pretrial and trial publicity. Further, as is apparent from the *Bridges*, *Pennekamp* and *Craig* cases, the Supreme Court seems to recognize a distinction between the effect of prejudicial publicity on a jury as against that on a judge.

[63] The provision for a jury trial is, in part, meant to take into account any misgivings by the press which stem from the fact that the present contempt procedure permits the same judge who presided at the trial out of which the allegedly contemptuous publication arose to hear and decide the merits of the contempt citation.

Following closely the outline suggested by Justice Meyer of the Supreme Court of New York,[64] the statute would be divided into two sections. The first section, supported by a legislative finding, would list specific disclosures which *per se* constitute a clear and present danger of substantial prejudice to the fair administration of criminal justice. The items therein would include (1) disclosure of the existence and substance of an alleged confession, (2) the prior criminal record of an accused, (3) the fact that an accused refused to submit to a lie-detector test, and (4) the existence and description of tangible evidence seized from an accused during a search or arrest. The disclosure of each would be prohibited until its admission into evidence at the trial, or, if not admitted, until the jury renders its verdict. Also prohibited should be expressions of opinion, whether through man in the street polls, columnists' comments or editorials, concerning the effect of evidence introduced, the credibility of witnesses or the guilt of the accused, all of which may usurp the function of the jury. Publication of any of these items would, without more, amount to a violation of this section of the statute.

As to items in the second section, publication would not constitute an offense unless the jury found that in the circumstances of the case concerning which publication was made the material published created a serious and imminent danger of substantial prejudice to the fair administration of criminal justice. In this second category would fall material, such as interviews with the family of the victim of a crime, statements as to the identity and possible testimony of prospective witnesses, publication of the names and addresses of the jurors sitting in the case, matter which appeals to racial, political, economic or other bias, or other information concerning the facts or the parties, which may pose a serious threat, depending on the circumstances of the case, to the securing to either the prosecution or the defense of a fair trial. This section would not prohibit the publication of these items outright, but would force the press to run the risk of their publication, just as it does in the area of libel.

While this proposed outline by no means exhausts the statutory possibilities or fully examines all the inherent problems, it is intended

[64] Statutory proposal made by Justice Bernard S. Meyer in "Are Additional Remedies Needed in the United States to Implement the Constitutional Guarantee of Fair Trial?" at 8-15, an address before the National Conference of State Trial Judges at the 85th Annual Meeting of the American Bar Association, August 4, 1962.

to encourage and point the way to appropriate legislative action. Furthermore, it is meant to demonstrate to the press that those responsible for the fair administration of criminal justice are wholly disenchanted with the fatalistic notion that "trial by newspaper" or by other news media is "an unavoidable curse of metropolitan living . . ."[65] In the absence of voluntary action by the press, the constitutional right to a fair trial will have to be secured by means which the press may find repugnant but which will have been brought on by its own disregard of this fundamental right. One way or the other, the right to a fair trial, a cornerstone of justice, must be protected.

[65] United States v. Leviton, F. 2d 848, 865 (2nd Cir. 1951) (dissenting opinion).